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In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,
Appellant,

v.

SEACOAST PRODUCTS, INC., ET AL.,
Appellees.

Motion For Leave To File Brief Amici Curiae And Brief Amici Curiae In Support Of Statement As To Jurisdiction To Review Judgment Of The United States District Court For The Eastern District Of Virginia

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In The

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No. 75-.....

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., ET AL.,

Appellees.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF STATEMENT AS TO JURISDICTION

The *amici curiae*[1] are all Virginia seafood producers. The Virginia Seafood Council is a non-profit organization that represents more than 100 members who, together, produce more than 95% of the seafood taken from Virginia waters. The other *amici curiae* account for 60% of all fin fish caught in Virginia waters and a substantial portion of oysters, crabs, and other shell fish taken therein.

The court below held invalid two of the basic provisions of the Virginia Code governing the fishing industries operating in that State. Obviously, the *amici*, whose operations are controlled by that Code, are directly and substantially affected by the judgment below and should be given an

[1] Virginia Seafood Council, L. D. Amory & Company, Inc., Chesapeake Herring Corp., The D. L. Edgerton Co., Lance C. Fisher, J. W. Ferguson Seafood Co., Inc., Fass Bros., Inc., Mr. Frosty Seafood, Inc., J. H. Lewis Seafood Company, W. F. Morgan & Sons, Inc., RCV Seafood Company, Shackelford-Schlifer Seafood Corp., Virginia Seafoods, Inc., Zapata Haynie Corporation.

opportunity to express their arguments on the law and the facts before this Court. In light of the judgment below, there is no other forum in which the rights of the great majority of participants in the Virginia fishing industry can be expressed or protected.

The court below held that § 28.1-60 of the Code of Virginia of 1950, as amended, (see Appendix B), violated the Equal Protection Clause of the Fourteenth Amendment. But, because the judgment was a response to a motion for summary judgment, and because the trial court was anxious for a speedy judgment, no opportunity was afforded Appellant to produce evidence of either a rational basis or a compelling state interest for the classifications. These classifications that have been held invalid have long existed in the laws of the Commonwealth of Virginia, in the laws of a dozen other States, and indeed, in the laws of the United States.

The court below also held that § 28.1-81.1 of the Code of Virginia of 1950, as amended (see Appendix B), violated the Supremacy Clause of the Constitution, art. VI, ¶ 2, because of preemption of this state law by the Act of 20 May 1974, 78 Stat. 194, 16 U.S.C. § 1081. Since this preemption concept sprang full-blown from the heads of the three judges who made up the trial court, without any argument or evidence offered or taken on the issue, again no one had any opportunity to present the case against a complete upheaval of the relevant roles of the States and the national government in the regulation of state and coastal fisheries.

Wherefore, *amici curiae* respectfully move that their petition to file a brief *amici curiae* in support of Appellant's Jurisdictional Statement, as well as his brief on the merits,

be granted. The motion is made necessary because, although Appellant's consent has been secured, the Appellees have denied their consent to the filing of this brief.

Respectfully submitted,

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BRIEF AMICI CURIAE IN SUPPORT OF STATEMENT AS TO JURISDICTION

INTERESTS OF AMICI CURIAE

The interests of the *amici curiae* in this litigation are set out at pp. *v, vi, supra,* in the Motion for Leave to File.

OPINION BELOW

The opinion below was entered by a three-judge court for the Eastern District of Virginia on 7 November 1975. It is not yet reported. Copies of the opinion and final order are attached hereto as Appendix A.

JURISDICTION

A final order granting an injunction against the enforcement of §§ 28.1-60 and 28.1-81.1 of the Code of Virginia of 1950, as amended, was entered by a three-judge district court convoked under 28 U.S.C. § 2284, on 7 November

1975. The jurisdiction of this Court rests on 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this controversy are the Supremacy Clause, Article VI, ¶ 2 and the Equal Protection Clause, Amendment XIV, § 2. The statutory provisions are 16 U.S.C. § 1081 and Virginia Code §§ 28.1-60 and 28.1-81.1. These statutes and provisions are set out in full in Appendix B.

QUESTIONS PRESENTED

1. Do state licensing statutes, which classify in terms of residency or citizenship, violate the Equal Protection Clause, although the classification is of ancient and justifiable origins, is the same as that of at least twelve other states, derives from national law which with state law is mutually controlling of the subject, and is justified by compelling state interests?

2. Does a federal statute providing for coordinate federal control preempt state authority, existing at least since 1781, over fisheries in state territorial waters, although the terms of the federal statute, its purpose, its legislative history, and other federal legislation all read against such preemption?

STATEMENT

This case is concerned with the capacity of the Commonwealth of Virginia to protect its fisheries against depredations by outsiders. The particular fisheries in question are the marginal sea off the Virginia coast and Virginia's chief inland sea, the Chesapeake Bay. The fish in question here

are essentially the menhaden, which are taken primarily for conversion into oils and fish meal.

Menhaden is the most valuable fishery resource in Virginia. Although menhaden are found in some degree from Maine to Florida, the Chesapeake Bay acts as a nursery for the development of the fish. While final data is not yet complete, studies over the last several years indicate that the fish spawn at sea off the Virginia and North Carolina capes and large numbers enter the sheltered waters of the Chesapeake Bay and its tributaries as fingerlings. In the estuarine waters of the major tributary rivers (which by statute in Virginia are protected against menhaden fishing) the small menhaden develop in great numbers. As they mature into fish of one and two years of age they school in the Bay between May and December of each year and form the basis for the resource fished by the Virginia industry. In the winter and spring many of the larger fish leave to spawn at sea and thence to range along the Atlantic coast. Alone among the Atlantic states, Virginia imposes seasonal limits on fishing for menhaden, limitations on net mesh size, and protects selected waters for small fish development.

While menhaden, as most fin fish, are quite mobile, and as older fish range for considerable distances, the distinguishing feature of menhaden in Virginia waters during their first two years of life is their relative stability. They form a particularly stable population as one and two year old fish during the Virginia menhaden fishing season extending from May to December. It is against this relatively stable fishing stock that the Virginia menhaden fishing effort is directed.

The season is changed periodically and the fishing effort imposed upon this resource is adjusted from time to time, based upon recommendations of scientists at the Virginia Institute of Marine Science and the National Marine Fisheries Service and the Virginia producers. The resource is

recognized by the participants as being of immense value, but requiring great care in terms of its preservation.

Since the earliest days of the Republic, both the States and the national government have exercised concurrent control over the commercial fisheries of the country. Thus, while a vessel must be documented by the national government,[1] it must also have the permission of the state to fish the local waters. And it is in connection with this second requirement that the issues in this case arise.

The Appellees here, plaintiffs below, brought suit to enjoin the enforcement of two provisions of the Virginia Code governing the taking of fish off the Virginia shores and in the Virginia bays. The first of these is § 28.1-60 of

[1] Federal statutes relating to the documentation of fishing vessels are set forth in 46 U.S.C. §§ 11, 251, and 252. In passing it should be noted that the court below confused 46 U.S.C. §§ 808 and 839 with federal documentation laws for fishing vessels. These sections of the Shipping Act of 1916 gave rise to the administrative hearings referred to in the appellees' pleadings below and preclude the sale of American documented vessels to foreign interests without the consent of the Secretary of Commerce. The hearing mentioned did not amount to a judicial determination of documentation of the vessels in American fisheries or licensing in the Virginia fisheries. The sections of the Shipping Act under which the hearing was conducted relate solely to an approval of the sale of vessels to aliens. After the sale was approved, the vessels could have been enrolled in fisheries of any jurisdiction depending on the laws of that jurisdiction.

Whether or not the vessels are enrolled in fisheries of the United States depends upon the applicable laws of the United States and the states in which the vessels are proposed to be used. Despite the assertion of the court below to the contrary. the Secretary of Commerce did not direct that these vessels be enrolled in American fisheries. The court below betrayed its misunderstanding of 46 U.S.C. §§ 808 and 839, and the hearings mentioned in the appellees' trial briefs, when it stated that "the acceptance [of the 68 vessels into the American fisheries] was ordered by the Secretary of Commerce under the provisions of the Shipping Act, of 46 U.S.C. 808, 839." In fact, the Secretary of Commerce merely signed orders permitting the vessels to be sold to aliens.

the Code of Virginia of 1950, as amended; the second is § 28.1-81.1 of the same Code.

It was on 23 March 1871 that the General Assembly of the Commonwealth adopted the predecessor of § 28.1-60. While the provision has been amended from time to time with regard to matters not revelant here, it has remained substantially the same since the time of its inception.

In essence, § 28.1-60 prohibits non-residents from taking fish for the purpose of converting the same into oil, fish meal, etc., except as provided in § 28.1-60(e). Under this subsection a non-resident may take "menhaden" within the marginal sea between the last Monday in May and the first day of December of each year, provided a license is obtained. The effect of the statute is to prohibit non-residents from taking menhaden within Virginia's chief inland sea, the Chesapeake Bay. Residents are permitted to fish pursuant to the terms of Virginia Code § 28.1-59 in designated portions of inland waters comprising the Chesapeake Bay and its tributaries, but the main rivers are closed to the taking of menhaden both by residents and non-residents.

The second statute under attack is § 28.1-81.1 of the Code of Virginia of 1950, as amended, which was signed by the Governor of Virginia and became effective on 19 March 1975. The effect of this statute is to reserve the harvesting of fish in Virginia waters to citizens of the United States. It is intended to deal with the problem of the threatened destruction of Virginia's fisheries by foreign fishing practices. As a result of overfishing by foreign interests, Virginia has experienced the virtual elimination of certain formerly important fisheries, such as the river herring. Treaties and other regulatory agreements have had no apparent effect upon the practices of these foreign interests, which fish a resource to exhaustion and then move on to another fishery resource. Realizing that the 200 mile fisheries limit legislation

before Congress would soon become a reality, and further realizing that such action would create new impetus for foreign fishing fleets to seek all available legal means to operate in coastal waters of the states, various fisheries interests, including several of the companies acting as *amici curiae* herein, testified as to the effect of foreign fishing practices on fishing stocks in support of legislation before the General Assembly to close the "loophole" which would permit foreign owned fishing vessels to fish through shell corporations in Virginia waters. The statements of Ammon G. Dunton, Jr. and Allen W. Haynie, in support of this legislation before the Committee on Agriculture, Conservation and Natural Resources, in the Virginia State Senate, and the Committe on the Chesapeake and Its Tributaries, in the House of Delegates, respectively, are annexed hereto as Appendices C and D to indicate the purpose of this legislation. The bill was also recommended by the unanimous vote of the Virginia Marine Resources Commission at a duly convened meeting on 28 January 1975. The bill was voted out of the Senate committee without a dissenting vote. Upon the floor of the Senate, consisting of 40 members, the bill was adopted by the vote of 40 to 0.

In the House of Delegates, the bill was referred to the Committee on the Chesapeake and Its Tributaries, which approved the bill by unanimous vote. On the floor of the House the bill was approved as emergency legislation by the vote of 85 to 0.

Appellees are corporations organized and with their principal places of business outside of the Commonwealth of Virginia. Seacoast Products, Inc., the parent corporation among the appellees, although organized under the laws of New York, is wholly owned by Hanson Trust Ltd., an English Corporation. These appellees have been engaged in taking menhaden from the Atlantic Ocean, including some

from the territorial waters of the Commonwealth of Virginia. They have not in the past taken fish from the Chesapeake Bay.

On 22 May 1975, one of the appellants, The New Smith Meal Company, Inc., made application for a Virginia license to fish for menhaden in Virginia territorial waters. That license was denied because § 28.1-81.1 of the Virginia Code forbids the issuance of such licenses to non-citizens of the United States.

This action was instituted on 14 July 1975. It sought to enjoin appellant from enforcing Code of Virginia §§ 28.1-60(3) and 28.1-81.1 upon the grounds that said provisions violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment and upon the ground that the statutes place an undue burden on interstate commerce in violation of U.S. Const., art. I, § 8. On 18 July 1975, a special three-judge court was designated to consider the issues. Subsequently, the Appellant filed his answer and a motion for the federal court to abstain.

On 7 November 1975, a judgment and an opinion were rendered sustaining a motion by Appellees for summary judgment and dismissing Appellant's motion for abstention.

The three-judge court held that the Virginia laws in question violated the Equal Protection Clause by distinguishing between citizens and non-citizens and between residents and non-residents for purposes of issuing licenses for fishing in Virginia territorial waters and in the Chesapeake Bay. It did not have recourse to the Commerce Clause argument put forward by Appellees. But it did, on its own accord, conclude that the area was preempted by federal law, 78 Stat. 194, 16 U.S.C. §§ 1081 et seq.

It is from this judgment that this appeal has been taken.

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL

The central issue raised by this appeal is the extent to which the States can safeguard from destruction the fishery stocks within their waters.

Virginia, in common with many other coastal states, has experienced the wholesale destruction of some of her most valuable fishery resources by foreign fishing efforts off her coasts. The river herring industry, once directly supportive of the employment of thousands of Virginians and a healthy fishery resource for more than 100 years, was destroyed in a commercial sense when the Soviet fishing fleet directed its efforts against it. This destruction has occurred, despite treaties governing the taking of fish by foreign interests, because of a lack of concern for long-range conservation of fishery stocks. Disregarding laws and regulations to which they are subject, these foreign interests have "stripped" clean particular stocks of fish and have then moved to other locations and other fishery resources. While highly productive in the short run, this philosophy of fishing has been responsible for major losses to United States fishermen, to the communities in which they live, and to the United States fishing industry. This destruction and this disregard of binding treaties by foreign interests have been amply documented in hearings on the 200 mile limit bill conducted by the Congress in Washington and in many coastal states, including Virginia, compiled in *Hearings on Extending the Jurisdiction of the United States Beyond the Present Twelve-Mile Fishery Zone, Before the Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Committee on Merchant Marine and Fisheries,* 93rd Cong. 2nd Sess. (1974). Bills effecting this 200 mile limit have now been overwhelmingly passed by each house of Congress and are now in conference.

Compare the self-interest of a resident Virginia fisherman with a foreign fisherman operating in the Chesapeake Bay or in Virginia's marginal sea. The Virginia fisherman is essentially a day fisherman, returning each night with his catch. He is dependent upon the continued existence of the local fishery stock. His home, processing plants, and other economic and social ties, bind him to an area, and make it imperative that he safeguard the source of his income. Thus, the Virginia fisherman will naturally take a different view toward conserving fishery stocks from the fisherman with no local ties who is merely seeking the most immediately productive method of fishing.

Conservation of fishery stocks must be viewed not only from the natural self-interest of the participants but also from the viewpoint of effective enforcement of fishery regulations. Inspectors can be far more effective against local fishermen, whose fish, nets and crew can easily be examined upon return to local ports, than with respect to non-local fishermen fishing in Virginia waters. Inspection of vessels based outside of Virginia would be dependent upon vessel boarding, a highly ineffective, difficult, and fragmentary surveillance technique.

The General Assembly of Virginia, recognizing the above factors, and having special knowledge of the fishery stocks to be conserved and their geographic locations, has determined that fishing licenses should be issued only to citizens of the United States, and in the case of menhaden fishing in the Chesapeake Bay should be limited to residents of Virginia.

I. The Judgment Below, Insofar As It Rests On The Equal Protection Clause, Would Invalidate Not Only The Statutes Directly In Question Here But Twenty-Seven Statutes Of Twelve Other States And Some Federal Statutes As Well.

The classifications utilized by the Virginia legislature in its effort to protect its fisheries from destruction and which were declared invalid by the three-judge court below are not unique to the Commonwealth of Virginia. Indeed, these classifications exist in many similar state and federal laws dedicated to the same end.

Experience has clearly demonstrated that when it comes to an issue of preservation of natural resources, non-Americans particularly, and non-residents as well, lack the motivation for preserving these resources for future generations. Their behavior has been rather to move into fisheries, take as many fish as possible without regard for the capacity of the fish to reproduce, and then, once the fisheries have been exhausted, to move on to still other waters in order to repeat their depredations. By granting the motion for summary judgment, the court below precluded Appellant from developing these facts. But these facts have caused many jurisdictions in the United States, including the national government, to inhibit the taking of such natural resources by aliens and non-residents. All of these statutes are invalidated by the reasoning of the lower court in finding the Virginia law invalid.

The following states, among others, have laws limiting the issuance of certain licenses to United States citizens: Alaska, Delaware, Massachusetts and Washington.[2] More-

[2] Alaska Rev. Statutes § 16.05.905; Delaware Rev. Statutes, Conservation Law, Title 7 §§ 917, 1115; Massachusetts General Laws, Chapter 130 §§ 38, 55; McKinney's Consolidated Laws of New York, Environmental Conservation Law §§ 13-0335, 13-0341(7); Washington Rev. Code § 75.28.020.

over, Delaware, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington and Wisconsin, among others, have laws favoring residents or excluding non-residents in the issuance of licenses to take certain marine resources from their jurisdictional waters.[3]

Not only does the judgment below invalidate the state laws referred to, but federal statutes as well. Inasmuch as the federal government, like the Commonwealth of Virginia, has classified citizens and non-citizens separately in the regulation of fishing and shipping, and, inasmuch as the standards of the Equal Protection Clause are equally applicable to national laws as state laws, *Bolling* v. *Sharpe,* 347 U.S. 497, 499 (1954), the national laws as well as the state laws would be invalid under the holding of the court below.

Thus, it follows from the trial court's decision that the Congressional choice adopting a classification based upon alienage in 16 U.S.C. § 1081, which was made with an awareness of the Constitutional requirements embodied in the Fifth Amendment, would be invalid. The fact that Congress felt the necessity to distinguish between citizens and aliens in order to conserve and protect fisheries certainly supports the argument that Virginia Code § 28.1-81.1 was necessary to achieve a similar purpose.

Moreover, the definition in the Virginia Law of "citizens of the United States" is identical to that employed by the

[3] Delaware Rev. Statutes, Conservation Law, Title 7 §§ 917, 1115, 1119; Maryland Code §§ 4-618, 4-703, 4-704, 4-805, 4-1003; Massachusetts General Laws §§ 38, 55; Michigan Statutes, Conservation § 308.24; Minnesota Statutes, Game and Fish Laws § 98.46; New Hampshire Rev. Statutes §§ 211:23, 211:62-d; McKinney's Consolidated Laws of New York, Environmental Conservation Law, Title 13 §§ 11-1315, 13-0333, 13-0335, 13-0341(7); Rhode Island Revised Statutes §§ 20-6-1, 20-6-2, 20-12-2; Vermont Statutes, Title 10 § 4608; Washington Revised Code § 75.28.020; Wisconsin Statutes §§ 29.34, 29.343, 29.35.

federal government in numerous laws related to shipping or fishing and making the very classification found invalid by the court below. The definition used in Virginia Code § 28.1-81.1, which embraces the concept of control in the case of corporations, is taken from that set forth in the Shipping Act of 1916, 46 U.S.C. § 802. Similarly it is used in § 2707 of the Merchant Marine Act of 1920, 46 U.S.C. §§ 883, 883-1, to limit the coastwise trade to vessels owned by citizens of the United States. There is an undeniable analogy between participation in coastwise trade and participation in the coastal fisheries. See also the Merchant Marine Act of 1928, 46 U.S.C. § 891u and the Merchant Marine Act of 1936, 46 U.S.C. § 1244.

If the use of citizenship in the above acts is reasonable for federal purposes, it is equally reasonable for the State to use it in a basically similar context.

The court below rested solely on the proposition that classifications of citizens and non-citizens, residents and non-residents were *per se* invalid. It made no effort and refused to receive evidence on the question whether there was a rational or, indeed, a compelling state interest in making the classifications which are and have been so pervasive in this area of fishing rights and coastwise shipping. The reliance of the trial court on the case of *Takahashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948) is misplaced. There the law in question singled out a single racial group, the Japanese residents of California. This was not an alienage classification, nor a residency classification, it was a racial classification. And the state could not show that there was any support for a classification that excluded this race from engaging in fishing in California territorial waters when it did not exclude any other alien group in the same manner.

The decision below will wreak havoc among the fishery and shipping laws of many States and the United States, as well as those of Virginia. It rests essentially on a refusal of that court to examine the question of whether there was a sufficient state interest to support the classificaion. It cannot be gainsaid that the question is of such importance that it calls for this Court's judgment as to whether all States and the federal government may continue to use this regulatory means to protect their interests in and to promote the preservation of such vital natural resources as American fisheries.

II. The Judgment Below That The Virginia Laws Have Been Preempted By A Federal Law, Not Directed To The Subject Matter Sought To Be Controlled By The Virginia Laws, Is Inconsistent With This Court's Judgments, With Governing Statutes Of The United States, And With The Legislative Purpose And Intent Of 16 U.S.C. § 1081.

The trial court, without benefit of briefs or arguments directed to the issue, invoked 16 U.S.C. § 1081 to rule that state control over fishing for menhaden in the Virginia territorial waters and Chesapeake Bay had been preempted by national legislation. This conclusion is clearly erroneous. If it were correct, it would result in a large amount of state authority being transferred to exclusive federal control in the face of contrary national legislation and the clear intention of Congress not to bring about such a result.

Regulation of coastal fisheries has long been a matter of joint federal and state control. 16 U.S.C. § 1081 specifically bans the fishing in American territorial waters of non-United States vessels, making the same kind of classification the trial court below found invalid as a violation of the Equal Protection Clause. It also provides an exception to this ban on foreign fishing upon certification by the Secretaries of State and Commerce that such authorization "would be in the national interest," and then only "upon concurrence of

any State, Commonwealth, territory, or possession directly affected." The last phrase makes clear the preservation of the rights of the States in the control of these waters.

In any event, there was no such certificate sought or issued in this case. All that happened was that certain vessels to be operated by Appellees were permitted to be sold to aliens. This hardly can be said to qualify them for fishing rights in Virginia territorial waters. If anything, under § 1081, it disqualified them from such access. But all this is, indeed, beyond the point. For, despite the *ipse dixit* of the trial court, 16 U.S.C. § 1081 did not preempt the authority theretofore clearly recognized as being within the powers of the States. Indeed, the Appellees' application for a license from the Commonwealth of Virginia is confirmation of this understanding.

A. Under The Decisions Of This Court A Federal Law Cannot Be Read To Supplant State Authority Unless By Its Terms Or Of Necessity That Is The Purpose And Effect Of The Federal Law.

This Court has made it abundantly clear that Congressional preemption of state power is not to be presumed, but must be a clear and necessary consequence of the federal action. That principle has been patently rejected by the court below, despite repeated and recent reiterations of the principle by this Court.

In the area of mutual control over ships and waterways, it should suffice at this point to cite *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440 (1960), where the national enrollment and inspection of a Great Lakes vessel was held not to preempt state law requirements of higher standards of performance, and *Askew* v. *American Waterways Operators,* 411 U.S. 325 (1973), where Florida was allowed to assert authority over oil spills in its territorial waters, in the

face of both the general admiralty jurisdiction of the national government and the Federal Water Quality Improvement Act of 1970. See also, for the controlling general rules about preemption, *Goldstein* v. *California,* 412 U.S. 546 (1973).

B. The Language And The Legislative History Of 16 U.S.C. § 1081 Demonstrate That Congress Did Not Intend To Preempt State Authority In Territorial Fisheries.

We have already referred to the fact that 16 U.S.C. § 1081, by its terms, reaffirmed the joint control over the state territorial fisheries that the trial court would abolish, by its language requiring "concurrence of any State, Commonwealth, territory, or possession directly affected." The legislative history abundantly supports the intention of Congress to leave the state power unaffected. Examples must here suffice.

The Report of the House Committee on the Merchant Marine and Fisheries, H.R. Rep. No. 1356, 88th Cong., 2d Sess. (1963) states:

> It was brought out at the hearings that the powers of the States in dealing with trespassers of their territorial waters would not be preempted by the passage of this bill and for those States already having sanctions, this bill would only supplement existing case law. [2 U.S. Code Cong. & Adm. News 1964, p. 2183.]

The Report of the Senate Committee on Commerce is S. Rep. No. 500, accompanying S. 1988, 88th Cong., 1st Sess., p. 4 (1963):

> This bill will not preempt the states of their powers against trespassers of their territorial seas. Some states now have sanctions, although they often are not as

comprehensive as those which would be effectively supplemented by the proposed bill.

The hearings are replete with support for this conclusion. See, e.g., *Hearings before the House Committee on Merchant Marine and Fisheries, on S. 1988,* 88th Cong., 2d Sess. 64, 81, 130, 139 (1963); *Hearings before the Merchant Marine and Fisheries Subcommittee of the Committee on Commerce of the U.S. Senate, on S. 1988,* 88th Cong. 1st Sess. 27, 35 (1962).

The legislative intent is clear. There was to be no preemption of state authority by the enactment of S. 1988. The trial court was plainly in error in assigning such a function to this statute.

C. The Fixed Pattern Of National Legislation Confirms The Authority Of The States In This Area And Clearly Reads Against Any Suggestion Of Preemption.

Unless Congress is to be presumed to have repealed a large part of its own legislation in this area, 16 U.S.C. § 1081 cannot be read to have preempted the authority of the States. We cite only examples of national legislation in support of this point.

Item. Submerged Lands Act, 43 U.S.C. §§ 1301, 1311. § 1311(a):

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) *the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in*

> *and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;* [Emphasis added.]

It should be noted that 43 U.S.C. § 1301(e) defines "natural resources" as follows:

> The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and *fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life* but does not include water power, or the use of water for the production of power; [Emphasis added.]

The same section proceeds to define "land beneath navigable waters within the boundaries of the respective states" to include:

> (a)(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such state and to the boundary line of each such state where in any case such boundary as it existed at the time such state became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, . . .

Item: *Contiguous Fisheries Zone Act,* 16 U.S.C. §§ 1091 *et seq.*

§ 1094:

> Nothing in this chapter shall be construed as extending the jurisdiction of the States to the natural resources beneath and in the waters within the fisheries zone established by this chapter or *as diminishing their jurisdiction to such resources beneath and in the waters of*

the territorial seas of the United States. [Emphasis added.]

Item. *Coastal Zone Management Act,* 16 U.S.C. §§ 1451 *et seq.*

§ 1451(h):

> The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance. [Magnusson Fisheries Management & Conservation Act of 1976.]

It follows that the trial court judgment holding the power of the States over their territorial waters to have been preempted by the legislation in 16 U.S.C. § 1081 is not only clearly erroneous but of such wide impact to call for its immediate correction by this Court.

CONCLUSION

The judgment of the court below calls for review and reversal by this Court. It has not only invalidated a large number of state and federal laws concerned with limiting access to fisheries to American citizens and residents, it has also ruled that the longstanding joint authority of the States and the national government was implicitly repealed by legislation that neither in fact nor in intent can be read to bring about such a drastic revision of our federal system.

We respectfully submit that this Court should note probable jurisdiction in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

CIVIL ACTION No. 75-69-NN

(Three-Judge Court)

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC. AND SECOND OCEANIC CORPORATION,
Plaintiffs,

v.

JAMES E. DOUGLAS, JR., COMMISSIONER, VIRGINIA MARINE RESOURCES COMMISSION,
Defendant.

FINAL ORDER

Upon consideration of the record, including the affidavits filed herein and the stipulations of counsel, as well as of the arguments of counsel orally and on brief, the Court, for the reasons stated in its opinion this day filed, ADJUDGES, ORDERS and DECREES:

1. That the motion of the plaintiffs for summary judgment in accordance with the complaint, be and it is hereby, sustained;

2. That the defendant, his successor and successors in office, as well as his agents, servants, employees and attorneys be and each of them is hereby restrained and enjoined from the enforcement against the plaintiffs or any

of them of the statutes designated as Code of Virginia, §§ 28.1-60 and 28.1-81.1, in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia; and

3. That the plaintiff recover their costs of the defendant.

/s/ Albert V. Bryan
Senior United States Circuit Judge

/s/ Richard B. Kellam
United States District Judge

/s/ John A. MacKenzie
United States District Judge

November 7, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
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CIVIL ACTION No. 75-69-NN

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC. AND SECOND OCEANIC CORPORATION,
Plaintiffs,

v.

JAMES E. DOUGLAS, JR., COMMISSIONER, VIRGINIA MARINE RESOURCES COMMISSION,
Defendant.

THREE-JUDGE COURT

Argued: October 15, 1975 Decided: November 7, 1975

Before BRYAN, Senior Circuit Judge, KELLAM, District Judge and MacKENZIE, District Judge.

T. H. Willcox, Jr., of Willcox, Savage, Lawrence, Dickson & Spindle, Norfolk, Virginia, counsel for plaintiffs; James E. Moore, Assistant Attorney General [Andrew P. Miller, Attorney General], Richmond, Virginia, counsel for defendant.

Albert V. Bryan, Senior Circuit Judge:

In question here is the constitutionality of two Virginia statutes restricting the fishing of menhaden in her part of Chesapeake Bay and in the Atlantic Ocean within three

miles[1] of her coast. Plaintiffs, Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, now and for a number of years engaged in such fishing in these areas, sue the Virginia Commissioner of Marine Resources to have these restrictions declared invalid and to enjoin his imposed enforcement of them.[2] Plaintiffs' motion for summary judgment must be sustained.[3]

The two statutes are Virginia Code § 28.1-60 and § 28.1-81.1. Epitomized, the force of § 28.1-60 is to allow a nonresident a license to fish menhaden "within the three-mile limit" but to exclude *non-residents* of Virginia from menhaden fishing in the Virginia portion of Chesapeake Bay, while at the same time permitting Virginia *residents* to fish for menhaden in that body of water. The force of § 28.1-81.1 is to exclude any fishing by *aliens* within the three-mile limit off the Virginia coast. Thus non-residence and alienage are the determinant factors in the ban of plaintiffs from a piscary for menhaden.

The challenged provisions, we conclude, "flagrantly and patently" as well as irreparably offend plaintiffs' rights under the Fourteenth Amendment's equal protection clause and under the preemptive and exclusive Federal regulation of sea fisheries. In this context the doctrines of abstention

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[1] This is known as the 3-mile limit or the jurisdictional belt along the coasts of the ocean bordering States. It was fixed by Secretary of State Thomas Jefferson in 1793 and has been generally accepted internationally. United States v. California, 332 U.S. 19, 33 (1947).

[2] Jurisdiction is rested on complete diversity of citizenship between plaintiffs and defendant as well as on the presence of a Federal question. 28 U.S.C. 1331, 1332. That the amount involved is in excess of $10,000, exclusive of interest and costs, is not disputed. A three-judge court has been convened in accordance with 28 U.S.C. 2281 and 2284.

[3] There are no critical, genuine factual differences between the parties.

have no place. In other circumstances they are appropriate: to obtain interpretation of a State statute, Railroad Commission v. Pullman Co., 312 U.S. 496 (1941); or to avoid needless interference with the administration of State domestic policies, Alabama Public Service Commission v. Southern Railway Co., 341 U.S. 341 (1951); or to avoid obstruction of State prosecutions, Younger v. Harris, 401 U.S. 37 (1971); but forbearance of Federal judicial action is not demanded when the deprivation of rights is so severe, clear and damaging as here. Huffman v. Pursue, 420 U.S. 592, 602 (1975); *Younger, supra,* at 53-54; Zwickler v. Koota, 389 U.S. 241, 248, 249-250 (1967). For the same reasons prior exhaustion of State administrative or judicial remedies is not mandatory. On study of the merits of the complaint we grant the relief it prays.

Plaintiff Seacoast Products is a Delaware chartered corporation with its principal office in New Jersey; Smith Meal is a Massachusetts corporation with its office in New Jersey; and Oceanic is a New York corporation having its principal place of business in that State. The last two corporations are wholly-owned subsidiaries of Seacoast which in turn is ultimately controlled, through subsidiaries, by Hanson Trust Ltd., a corporation organized and existing under the laws of the United Kingdom. For many years the plaintiff parent and subsidiary corporations have been embarked on menhaden seining in Chesapeake Bay and in the Virginia three-mile ocean belt.

Menhaden are not edible by humans. They are ground into fish meal for poultry feed, fish solubles as ingredients of animal feed, and fish oil for the manufacture in Europe and Canada of margarine. Hence the statutes are not purposed to conserve the food supply of the State. It is conceded by plaintiffs that Virginia could exact from them the same

licenses as she required of residents for fisheries in her inland waters. Indeed, plaintiffs have heretofore applied for and been granted the requisite licenses for several years past. However, based on the two Code sections, their applications were denied in May 1975 because of their non-resident status and ultimate British control.

I. Plaintiffs' first point is that since the licenses are granted to Virginia domestic and resident corporations but refused non-resident corporations, there is discrimination in contravention of the Fourteenth Amendment assurance of equal protection of the laws. It cannot be successfully gainsaid that this is in actuality the impact of § 28.1-60.

Particularly exampling the discrimination is the licensing of Zapata Haynie Corporation and Standard Products Company, Inc., both resident corporations of Virginia, to fish menhaden in the areas forbidden non-residents. It is alleged, without contradiction, that Zapata is the largest, Seacoast the next largest and Standard the third largest of such fishers.

Supportive of plaintiffs is Takahashi v. Fish and Game Commission, 334 U.S. 410, 419-20 (1948). It dealt with the denial by a State of a license to a lawfully resident Japanese to earn his living by fishing commercially in ocean waters off her coast. The State action was premised on his ineligibility under Federal law to achieve United States citizenship. In reaching its decision the Court declared the equality in *every* State of all who are lawful residents of *any* State:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

Incidentally, the Court in both *Takahashi,* supra, at p. 420, and in Toomer v. Witsell, 334 U.S. 385, 401 (1948) declined to treat, as *contra,* McCready v. Virginia, 94 U.S. 391 (1876) upholding the State statute prohibiting "citizens of other States but not Virginia citizens from planting oysters" in her tidal river waters.

II. The alienage issue, made by the plaintiffs' attack on Virginia Code, § 28.1-81.1, is predicated on the statute's denial of a commercial license to any person, firm or corporation not a citizen of the United States for the taking of any fish from the marginal ocean waters of Virginia. The vitality of that statute, however, has been superseded by an Act of Congress approved May 20, 1964, 78 Stat. 194, 16 U.S.C. 1081, et seq., declaring as far as pertinent here that "[i]t is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . .", except upon authorizations not relevant here. In our judgment this legislation preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them. Toomer v. Witsell, 334 U.S. 385, 393, 394 (1948); United States v. California, supra, 332 U.S. 19 (1947); Skiriotes v. Florida, 313 U.S. 69, 75 (1941); Manchester v. Massachusetts, 139 U.S. 240 (1891).

Subsequently, the United States allowed Seacoast's 68 vessels to be documented unconditionally as vessels of the United States, thus rendering them eligible under 16 U.S.C. 1081 to fish within the Virginia 3-mile limit. The acceptance was ordered by the Secretary of Commerce under the provisions of the Shipping Act, 46 U.S.C. 808, 839. He acted only after a full hearing, at which competing fisheries opposed the approval because of the British interest in Seacoast.

Although it is not an issue here, the evidence is abundant to warrant the documentation. Seacoast is, as heretofore noted, incorporated under the laws of Delaware; it is operated by boards of citizen directors and officers; all the ship officers and crews are also United States citizens. Clearly, Seacoast and its subsidiaries are lawfully fishing in the Virginia waters despite her proscriptive statute.

However, the State maintains that the statute is essential to the protection of the State's ocean waters against depredations by citizens of foreign countries or their ships. The argument is that the jurisdiction of the Federal government begins at the farther limit of the 3-mile zone and from there extends to the limit of the new 12-miles sovereignty line of the United States. Virginia concludes that, therefore, she has the duty and power to exercise control within the 3-mile limit. We are unable to agree. The decisions heretofore cited—*Toomer, California, Skiriotes* and *Manchester,* supra —determining Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit. Accordingly, prevention of incursions by foreigners is the responsibility exclusively of the Federal government.

III. Finally, enforcement of the Virginia statutes uncontestably would inflict irreparable injury upon plaintiffs because of the natural habits of menhaden. Migratory fin fishes commonly swimming on the surface in great shoals or schools, they are taken in purse-nets. From January to March they congregate in the far offshore seawaters from North Carolina to Florida. Beginning in March they run northwardly, as far as Cape Cod. They return in the fall and in January move again far out to sea—later to retrace their March-October path. Only in the summer are they to

be found just outshore, when and where, obviously, fishing of them is practicable.

Should Virginia press its two statutes—both of which contain severe sanctions for violations—during the summer by the seizure of even one of plaintiffs' ships, since it loads $80,000 worth of menhaden, or by otherwise interrupting plaintiffs' fishing, there would be no recoupment whatsoever for losses occurring during or after the prosecution of the charges, no matter if plaintiffs prevailed at trial. Catches already made would also be lost for the cargoes are quickly perishable. It is reasonable to assume that any such litigation could last for months, certainly into the summer season. These very facts prove the irreparable injury the Court predicted in Toomer v. Witsell, supra, 334 U.S. 385, 392 (1948). "[T]he danger of irreparable loss is both great and immediate." Fenner v. Boykin, 271 U.S. 240, 243 (1926).

Thus plaintiffs' prayer for an injunction, in addition to a declaration of the invalidity of the Virginia statutes, should be granted restraining the continued refusal of the defendant Commissioner to issue the requisite licenses to plaintiffs.

An order will be entered effectuating this opinion.

APPENDIX B

Supremacy Clause, U.S. Const. art. VI, ¶ 2

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Equal Protection Clause, U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

16 U.S.C. § 1081

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States

is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Nothwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

Va. Code § 28.1-60

Non-residents generally.—(1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.

(2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.

(3) *License for taking menhaden fish.*—A nonresident person, firm or corporation *may* take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

(4) *Application for license; affidavit required.*—Such nonresident person, firm or corporation shall apply to the Commissioner of Fisheries for such license, at the office of the Commissioner. Before granting such license the Commissioner shall require the applicant applying for the same to disclose by written affidavit:

(a) The true name or names of the person, persons, firm or corporation owning the purse net, seine, vessel or watercraft, and all the apparatus thereunto belonging, for which the license is desired; and if it be a firm, the true names and addresses of all the members of such firm; and, if a corporation, the location of the principal office and the names and addresses of the officers thereof.

(b) The name of each and every vessel, steamer or other watercraft, and the port in which the same is registered, for which such license is desired.

(c) That during the period of the license the owners and all persons employed by them will not violate any of the laws of this State in regard to the taking and catching of fish in the waters thereof.

Should the Commissioner of Fisheries be fully satisfied that the statements set forth in the affidavit are true and bona fide he shall then grant a license to such applicant, upon the applicant's payment of the same license fee as set forth for residents in § 28.1-59; provided, that in the event a resident of Virginia would be required to pay higher license fees in the applicant's state, then such applicant shall be required to pay the same license fee in this State which a resident of Virginia would be required to pay in the applicant's state. Nothing in this section shall be construed to permit fishing west of the aforementioned straight line from Cape Charles Lighthouse to Cape Henry Lighthouse.

(5) *Service of process.*—Every such licensee shall by written power of attorney appoint the Secretary of the Commonwealth and his successors in office, its agent, upon whom shall be served all lawful process against or notice to, such licensee, and who shall be authorized to enter an appearance in his behalf. The service shall only be made upon the Secretary of the Commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate. The provisions of § 8-47 shall not apply to process in any action, suit, or motion against such licensee to be served upon the Secretary of the Commonwealth. A copy of such power of attorney, duly certified and authenticated shall be filed with the Secretary of the Commonwealth, and copies thereof duly certified by him shall be received as evidence in all the courts of this State. No judgment shall be entered against the licensee until after the process has been served as set forth for at least ten days.

Whenever lawful process against, or notice to, any such nonresident person, firm or corporation shall be served as hereinabove provided for, the Secretary of the Commonwealth shall forthwith mail a copy of such process or notice to such nonresident person, firm or corporation. For the first process or notice to be so mailed, the Secretary of the Commonwealth shall collect two dollars and fifty cents, and for each additional process or notice to be so mailed the sum of fifty cents, which shall be paid by the plaintiff at the time of such service, and the same shall be recovered by him as a part of the taxable costs, if he prevails in the suit or action.

A judgment, decree or order of the court entered or made against any such nonresident person, firm or corporation shall be as valid and binding on such nonresident person, firm or corporation as if such nonresident person, firm or

corporation had been a resident and served with process or notice therein.

(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Va. Code § 28.1-81.1

Licenses for taking fish restricted to United States citizens.—(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens and the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of

its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five percentum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

APPENDIX C

STATEMENT BY AMMON G. DUNTON, JR., ESQUIRE, BEFORE THE SENATE COMMITTEE ON AGRICULTURE, CONSERVATION, AND NATURAL RESOURCES

January 27, 1975

Mr. Chairman, members of the Committee, I am Ammon G. Dunton, Jr., a member of the firm of Dunton, Simmons & Dunton. We act as counsel for Zapata Haynie Corporation, a Virginia corporation and a major participant in the American menhaden fishing industry.

I assisted Senator Manns in the drafting of S.B. 941. It has been reviewed by Commissioner Douglas, who is here to testify in support of this legislation.

The bill would prohibit the licensing of foreign nationals (whether they be acting as individuals, partners, or controlling elements of corporations) from engaging in the taking of commercial fish from the waters of the Commonwealth.

Paragraph (a) of the first section of the bill sets forth the words of prohibition, and the fact that the requirement that licenses be granted only to U.S. citizens does not eliminate any other requisite to the issuing of licenses as required by the Code.

Paragraph (b) defines a corporation deemed a U.S. citizen.

Paragraph (c) sets forth provisions designed to eliminate evasion of the 75% ownership requirement. These are taken from the federal Shipping Act of 1916 definition of corporate citizen, which has been found to be effective through the years.

Section 2 of the bill declares an emergency to exist.

Evidence taken around the country in the hearings on the 200 mile limit bill now pending before the Congress in

Washington has established that American fisheries should be reserved for American citizens because they alone have the true incentive to conserve and maintain our domestic fishery resources. The American fishing industry, particularly the menhaden segment, has exhibited a fiduciary quality with respect to the management of its fishing effort. American menhaden companies have assisted in studies regarding the life cycle and movement of menhaden and have responded to requests from the National Marine Fisheries Service for reduction in fishing efforts in certain years. As a result the present menhaden stocks are relatively plentiful in areas where foreign fishing has not interfered with the resource, such as in the Chesapeake Bay and in portions of the Gulf of Mexico. On the other hand, where foreign vessels have harvested unknown amounts of unknown species, which we suspect include substantial quantities of menhaden, large scale reductions in the availability of fish have occurred. It is, I believe, fair to say that these foreign vessels are not motivated by a desire to preserve fishing stocks, but instead engage in "strip fishing" which produces large short-term profits but destroys the resource.

The present law in Virginia, contrary to most impressions, does not reserve our domestic fisheries resource to U.S. citizens in all cases.

The simplest means by which foreign owners can fish within Virginia waters is to acquire a Virginia corporation having American documented vessels. While it is true that foreign built or documented vessels will not be permitted to fish within Virginia waters, foreign owned American vessels can.

Within the past few months the control of approximately one-third (⅓) of the American menhaden vessels has passed to foreign interests; and despite objections raised by other American participants, unconditional approvals of

these sales were granted by the present Administration in Washington, ostensibly because there were no clear federal legislative provisions to the contrary. Similarly, a major portion of the American salmon fleet on the west coast has recently been acquired by Japansese interests, in that instance without so much as a hearing being permitted in order to allow American industry to object. The transactions I have referred to are the sale of the Smith group of companies to Hanson Trust and the sale of Whitney-Fidalgo Seafoods, Inc. to Kyokuyo Ltd. of Japan. These two unconditional sales to foreign interests (although conditions might have been imposed by the Maritime Administration) have allowed substantial foreign entry into the American fishery itself for the first time. Here in Virginia, I understand Japanese investment has been made in the lobster industry. Furthermore, these foreign interests can expand their position almost without limit, and can profit from the transactions by disposing without notice to anyone of their stock investments to other foreign interests who then will also have established positions within the American fishery.

As an example, I will give you a hypothetical situation which could occur under existing federal and Virginia law as it is presently being interpreted by the administrative agencies involved. Hanson Trust, through intermediary American corporations, has acquired sixty-eight American menhaden vessels licensed for use in the American fishery. If Hanson should retain approximately one-half of the vessels for its own use, as it has stated it intends to do, it could sell the stock of a corporation owning the balance of vessels to a company controlled by, for instance, Russians. The Russians, in turn, could fit the vessels out for fishing and enlarge them if they saw fit, and fish with impunity within the Chesapeake Bay.

It is true that American masters and watch officers must be in charge of the vessels and the vessel owning corporation would need some American nationals as officers and directors; but it is quite possible to find American citizens who are willing to serve in these capacities if sufficient compensation is paid. Also, theoretically, it is true that the same laws affecting the taking of fish by Americans would apply to the Russian operators. In point of fact, enforcement of fishing laws and regulations would be difficult in the face of any determined effort to overfish by any particular organization.

The practical answer to the problem is to adopt legislation clearly prohibiting the issuance of licenses for the taking of commercial fish from Virginia waters if the persons to whom the licenses would be issued are controlled, directly or indirectly, by foreign nationals. The enactment of such legislation would implement the long standing federal and state policy of reserving the American fisheries for American citizens.

I strongly urge the adoption of S.B. 941 on an emergency basis.

I thank you for the opportunity to appear before you today and to present these comments.

APPENDIX D

ZAPATA HAYNIE CORPORATION
STATEMENT BY ALLEN W. HAYNIE, PRESIDENT OF ZAPATA HAYNIE CORPORATION, BEFORE THE HOUSE OF DELEGATES COMMITTEE ON THE CHESAPEAKE AND ITS TRIBUTARIES

February 14, 1975

Mr. Chairman, members of the Committee, I am Allen W. Haynie of Reedville, Virginia, and I serve as President of Zapata Haynie Corporation. I am grateful for this opportunity of appearing today to present my views and support of Senator Mann's Bill to restrict the issuances of licenses for the taking of commercial fish to the citizens of the United States.

Our company is a part of the menhaden industry. Our plants are located on the Atlantic and Gulf coasts and we produce fish meal, fish oil, and condensed and/or dried fish solubles

The menhaden fishing fleet in the United States numbers approximately 125 to 140 vessels which range in size from 140 to 185 feet in length. They carry a crew of 17 men each and together with supporting processing plant and shore-side crews, the industry's employment totals between 5,000 to 6,000. Our company operates 36 vessels, 25 airplanes, 5 plants and employs about 1,300 people of which approximately half are Virginians.

In addition to our menhaden operation, our company previously conducted operations in the river herring fishery until the resource was destroyed by foreign off-shore fishing. We dismantled our plant, sold our equipment and vessels, and discontinued operations some months ago.

Dr. Jackson Davis of the Virginia Institute for Marine Science states, in one of his reports to our trade association

about 1965, that the river herring resources had remained in a very healthy and stable condition for about 100 years, and was perhaps the most stable resource along the Atlantic coast. It was about 1966 that the foreign off-shore fishing fleets began to operate south of Ocean City, Maryland; and I personally stated at that time to Ambassador Donald McKernan, who was Special Assistant for Fisheries to the Secretary of State, that if this great foreign fleet continued to fish on the river herring resource, it would be extinct within 5 years. Several bi-lateral agreements negotiated by our State Department made very feeble and non-productive attempts to discourage foreign fishing of this resource, and as stated earlier, it no longer exists in quantities justifying commercial ventures of any size. Because of this, our canning operation, which was established at Mundy Point, Virginia, to process river herring in 1880, has been closed. It employed 300 persons in 1965. (Attachment A—Chesapeake Fisheries Historical Catch Statistics, Alewives, 1880-1972).

It is our opinion that due to inadequate government surveillance, we are unable to determine the extent to which foreign fishing has affected our menhaden resource. A very large Russian purse seine fleet has been developed and has been operating on the Atlantic during the past 3 years. (Attachment B—National Marine Fisheries Service Surveillance Report). This new purse seine capacity of the Russians, employing large vessels capable of operating the largest kind of purse seines, is perhaps as great, if not greater, than that of the entire U.S. menhaden fleet.

For the last 50 years very large schools of menhaden have migrated from the northeast, the Jersey coast and the Chesapeake Bay south to the Carolinas, where a fishery had been successfully conducted during November and December in the Beaufort-Morehead City, North Carolina area. While some say it is merely a coincidence, I believe that the existence of this Russian purse seine fleet is the reason that the fish have not reached North Carolina in commercial quantities during the past 3 years. The Russian seiners operate in the migratory path of the menhaden. Where there were 5 plants operating in North Carolina in the 1960's, only 1 now continues and this on a small scale.

Although foreign fishing effort has seriously depleted marine resources beyond our territorial sea, such foreign effort has not yet been undertaken in substantial quantity within our territorial waters or the Chesapeake Bay. It has come to our attention that by means of the use of a shell corporation owned entirely by foreign nationals and the use of American flag vessels, foreign interests can, if they so desire, fish within the Chesapeake Bay and within the territorial waters of this Commonwealth. I feel that any such foreign fishing effort within our waters would be seriously detrimental to the interests of the citizens of this country and this state. I feel that this loophole should be closed by appropriate emergency legislation.

In my opinion, the United States has become a second-class fishery nation which, to a great extent, is a result of this unwarranted foreign destruction of fisheries off our coast. In excess of 75% of the fin fish caught off our coast are caught by foreign fishermen. Only 25% is still controlled by U.S. fishermen. Menhaden represents more than 40% of the total tonnage of fin and shell fish landed by U.S. fishermen.

Therefore, after giving this matter serious deliberation, I urge your support and passage of this vital legislation.

ATTACHMENT A

SUMMARY OF THE MENHADEN FISHERY, 1873-1972

Year	Plants	Fish Received	Year	Plants	Fish Received
	Number	Thousand Pounds		Number	Thousand Pounds
1873	62	266,459	1910	(1)	(1)
1874	64	339,228	1911	(1)	(1)
1875	60	377,429	1912	48	711,435
1876	64	343,342	1913	(1)	(1)
1877	56	393,720	1914	(1)	(1)
1878	56	514,412	1915	(1)	(1)
1879	60	426,833	1916	(1)	(1)
1880	79	520,506	1917	(1)	306,146
1881	97	304,309	1918	(1)	259,292
1882	97	232,248	1919	(1)	438,520
1883	78	411,019	1920	(1)	(1)
1884	52	575,257	1921	40	691,132
1885	50	321,074	1922	45	812,342
1886	26	189,681	1923	50	743,895
1887	28	223,488	1924	45	344,284
1888	24	294,391	1925	43	532,118
1889	29	372,064	1926	41	382,781
1890	28	357,570	1927	39	392,763
1891	27	237,943	1928	34	362,213
1892	29	149,828	1929	37	442,443
1893	33	245,492	1930	33	409,513
1894	44	357,352	1931	27	236,432
1895	42	309,370	1932	24	375,479
1896	35	268,955	1933	30	357,726
1897	41	391,483	1934	27	517,403
1898	40	363,475	1935	27	434,386
1899	(1)	(1)	1936	29	516,104
1900	(1)	(1)	1937	32	529,202
1901	36	609,744	1938	32	517,530
1902	(1)	(1)	1939	33	574,825
1903	(1)	(1)	1940	30	634,589
1904	(1)	(1)	1941	29	775,087
1905	(1)	(1)	1942	30	482,644
1906	(1)	(1)	1943	25	615,554
1907	(1)	(1)	1944	27	685,980
1908	(1)	(1)	1945	24	759,074
1909	(1)	(1)	1946	28	916,013

(1) Data not available.

Year	Plants	Fish Received	Year	Plants	Fish Received
	Number	Thousand Pounds		Number	Thousand Pounds
1947	31	948,156	1960	38	1,999,036
1948	31	1,007,889	1961	35	2,290,936
1949	31	1,072,630	1962	33	2,227,316
1950	35	1,000,498	1963	32	1,787,638
1951	35	1,103,915	1964	31	1,530,631
1952	40	1,386,281	1965	33	1,651,022
1953	36	1,683,406	1966	33	1,275,623
1954	34	1,740,600	1967	32	1,133,254
1955	35	1,848,299	1968	29	1,343,902
1956	38	2,076,588	1969	(1)	1,516,292
1957	41	1,681,580	1970	(1)	1,731,179
1958	38	1,544,683	1971	(1)	2,149,973
1959	40	2,193,864	1972	(1)	1,870,372

CHESAPEAKE FISHERIES HISTORICAL CATCH STATISTICS

ALEWIVES, 1880-1972

(Thousands of Pounds)

Year	Maryland Quantity	Virginia Quantity	Total Quantity
1880	9,204	6,925	16,129
1887	11,062	4,402	15,464
1888	11,512	6,453	17,965
1890	19,767	10,642	30,409
1891	17,419	11,013	28,432
1896	17,667	12,198	29,865
1897	17,139	13,690	30,829
1901	13,747	13,914	27,661
1904	14,485	14,604	29,089
1908	28,805	37,885	66,690
1909	23,637	27,788	51,425
1915	12,568	16,054	28,622
1920	7,072	16,665	23,737
1921	6,505	18,834	25,339
1925	7,701	17,910	25,611
1929	5,924	12,570	18,494
1930	5,741	15,387	21,128
1931	7,827	17,239	25,066
1932	7,553	13,852	21,405
1933	6,550	19,177	25,727
1934	5,234	5,846	11,080
1935	4,229	10,974	15,203
1936	3,369	8,689	12,058
1937	3,819	15,064	18,883
1938	5,397	17,691	23,088
1939	4,398	14,831	19,229
1940	4,679	11,433	16,112
1941	5,061	11,951	17,012
1942	3,422	9,258	12,680
1944	3,504	17,841	21,345
1945	2,584	14,619	17,203
1946	3,497	12,029	15,526
1947	2,746	22,173	24,919

Year	Maryland Quantity	Virginia Quantity	Total Quantity
1948	3,720	19,365	23,085
1949	4,965	22,003	26,968
1950	5,926	28,702	34,628
1951	6,752	32,604	39,356
1952	4,494	28,841	33,335
1953	4,653	23,976	28,629
1954	3,981	27,930	31,911
1955	5,145	21,843	26,988
1956	5,026	22,107	27,133
1957	3,410	18,758	22,168
1958	4,391	18,361	22,752
1959	4,484	17,447	21,931
1960	3,525	15,464	18,989
1961	2,444	15,526	17,970
1962	2,378	25,300	27,678
1963	1,466	26,085	27,551
1964	1,314	26,640	27,954
1965	2,092	36,200	28,292
1966	1,433	28,535	29,968
1967	2,337	28,107	30,444
1968	3,963	32,319	36,282
1969	3,458	30,446	33,904
1970	2,065	19,046	21,111
1971	2,811	10,285	13,096
1972	1,690	10,451	12,141

ATTACHMENT B

U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
Provincetown, Massachusetts 02657

Date: June 20, 1973
To: Chief, Division of Enforcement and Surveillance, NMFS, Gloucester, Mass.

From: Alan F. Mager, Fisheries Enforcement Agent
Subject: Enforcement and Surveillance Flight—June 19 1973

On June 19, 1973 an enforcement and surveillance flight was conducted in cooperation with the United States Coast Guard Air Station, Cape Cod, Bourne, Massachusetts by Fisheries Enforcement Agent Alan F. Mager.

The flight was conducted after dark and had a twofold purpose: (1) to obtain information regarding the activity of a large fleet of Soviet purse seiners operating near the northern edge of Georges Bank, and (2) to conduct a surveillance of the contiguous fishing zone between Cape Cod and Portland, Maine. Flight conditions were excellent with 20-25 mile visibility under clear to partly cloudy skies. Seas were exceptionally calm.

The fleet of Soviet purse seiners was located at about 9:30 PM (EDT) just north of the northern edge of Georges Bank. The fleet numbered approximately *90 vessels,* counting both support vessels and seiners. When sighted, *about 80% of the seiners were actively fishing, confirming previous suspicions that this was primarily a nighttime fishery. Large amounts of fish were observed aboard two support vessels, but could not be identified by species due to poor lighting.*

On the contiguous zone patrol, a group of 6 fishing vessels was sighted on Jeffreys Ledge. The group included *3 large stern trawlers (probably East German)* and 3 small

side trawlers (probably United States). Positive identification could not be made because glare from the vessels' lights made it impossible to see names, numbers or even stack markings.

Fishing Vessel Sightings
June 19, 1973

Position # 1 3 miles to either side of a line between 42°20′N., 68°00′W. and 42°15′N., 67°10′W.

93 to 127 miles east-northeast/Cape Cod.

Approximately 80 Soviet purse seiners, mostly of the SRTR class, but also including some SRTK's, were sighted along with at least 8 support vessels of which at least 6 were of the factory base type.

About 80% of the fishing vessels had their purse seines deployed when sighted. *No fish were sighted on any of the seiners,* but large amounts of fish were observed in holding bins on the decks of two of the support vessels. Lighting conditions did not permit identification of the species. Other support vessels had great heaps of barrels on their decks.

Several of the seines observed had attached to them a raft-like object about 8-10 feet in diameter which displayed a single red light. This object was attached to the middle of the net's floating line and thus marked the outer limit of the net when fully deployed.

Observance of international rules of the road for fishing vessels regarding fishing lights was not uniform among these seiners. Many displayed the required red-over-white lights for purse seiners. Many others, though actively seining, displayed the green-over-white lights required for trawlers. Still others showed neither of these signals.

Position # 2 43°08′N., 70°02′W. (4-mile radius) 22 miles southeast/Cape Porpoise, Maine.

In this position, 3 large stern trawlers and 3 small side trawlers were sighted. Because of lighting conditions, no names, numbers or other identifying marks could be seen on these vessels. Judging from size, color and design, the three stern trawlers were probably East German and the three side trawlers, United States.

Trawl warps extending from the rear of all three stern trawlers were plainly visible, but the activity of the smaller vessels could not be determined.

TABLE 1—FOREIGN FISHERY VESSELS OPERATING OFF U.S. COASTS DURING MAY 1973; (EXCLUDING DUPLICATE SIGHTINGS); BY TYPE OF VESSEL AND COUNTRY

Fishing grounds	Stern[1] trawlers	Medium[2] trawlers	Other fishing vessels	Processing and transport vessels	Support vessels[3]	Research vessels[4]	Totals
Off Pacific coast:							
Off Alaska:							
Japan	32	119	222	28	—	2	403
Soviet Union	16	57	—	10	2	2	87
Republic of Korea	3	4	1	2	—	—	10
Total	51	180	223	40	2	4	500
Off Pacific Northwest:							
Japan	1	—	1	—	—	—	2
Soviet Union	38	19	—	5	4	2	68
Other	—	—	—	—	—	—	—
Total	39	19	1	5	4	2	70
Off California:							
Soviet Union	26	4	—	2	1	2	35
Japan	—	—	—	—	—	—	—
Total	26	4	—	2	1	2	35
In the Gulf of Mexico:							
Mexican	—	—	—	—	—	—	—
Cuban	—	—	11[5]	—	—	—	11
Soviet	—	1	—	—	—	—	—
Japanese	—	—	—	—	—	—	—
Other	—	—	—	—	—	—	—
Total	—	1	11	—	—	—	12
Off Atlantic coast:							
Soviet Union	63	95[6]	—	14	2	—	174
Poland	18	12	—	2	—	—	32
East Germany	6	11	—	3	—	—	20
Federal Republic of Germany	—	—	—	—	—	—	—
Bulgaria	4	—	—	—	—	—	4
Rumania	3	—	—	—	—	—	3
Spain	5	2	—	—	—	—	7
Japan	2	—	—	—	—	—	2
Italy	—	—	—	—	—	—	—
Norway	—	—	—	—	—	—	—
Canada	—	—	—	—	—	—	—
Other (French)	—	—	—	—	—	1	1
Total	101	120	—	19	2	1	243
Grand total	217	324	235	66	9	9	830

[1] Includes all classes of stern factory and stern freezer trawlers.
[2] Includes all classes of medium side trawlers (nonrefrigerated and refrigerated, and freezer trawlers).
[3] Includes fuel and water carriers, tugs, cargo vessels, et cetera.
[4] Includes exploratory, research, and enforcement (E) vessels.
[5] Lambda shrimp trawlers.
[6] Of a total 95 medium side trawlers, 51 were rigged as purse seiners.